No. 15,913

United States Court of Appeals

For the Ninth Circuit

JOSE DIAS DE SOUZA,
Appellant,

vs.

BRUCE G. BARBER, Director of Immigration and Naturalization,
Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division.

APPELLANT'S CLOSING BRIEF.

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STATEMENT OF FACTS.

In its reply brief (page 8), appellee has found it expedient to reprint several irrelevant facts whose sole function seems to be to paint a generally bad picture of appellant. That appellant may have been married twice, may have had two illegitimate children, may have been a defendant in a "paternity action", and may, as a youth, have served a four-month sentence in a reformatory, can have no real bearing on the issues before this Court.

Again, at page 11, the government finds it expedient to mention several entries of appellant prior to the June, 1957, entry relied upon in the deportation proceedings.

The facts are uncomplicated: Deportation proceedings against appellant were instituted in 1929 when he was imprisoned at San Quentin while a minor without guardian or counsel. He was ordered deported because he had been sentenced for a turpitude crime within 5 years of entry to the United States. The government did not prove the entry by producing witnesses, depositions or other evidence. That prerequisite was supplied by the exaction from appellant of a statement that at age 16 he had gone into Mexico at the direction of his employer in the course of his employment to deliver produce. In 1930 appellant was deported. In June, 1957, he re-entered the country. The government instituted deportation proceedings under section 242f of the Immigration & Nationality Act of 1952 (8 U.S.C.A., sec 1252f). Appellant was found to have unlawfully re-entered the United States, and by the terms of said section of the Act, the prior order was deemed to have been reinstated and appellant had to be ordered deported under that prior order. On habeas corpus, the District Court refused to exmaine the record of the prior administrative proceedings although the law required the present deportation to be based thereon and although said record was lodged with the District Court by the government.

QUESTIONS PRESENTED.

At page 10 of its brief the government poses three questions. The first of these is not clear: Was "respondent" required to entertain a collateral attack upon the prior proceedings? Does this mean: Was the

administrative officer or board required to examine the prior proceedings for fairness? If so, appellant has cited authority for such action at pages 17-20 of his opening brief. Does the question mean: Should the government be put to the trouble of listening to appellant? The question is not clear. In any event, appellant's fundamental right to due process has been violated, and he sincerely seeks the aid of this Court to strike the void order from the record and require the government to proceed with due regard for appellant's constitutional rights.

In answer to the second question, the Court below should have reviewed the 1929 order, for (1) such order was legally before it since section 242f of the Act required that any deportation be based upon the prior order, and (2) such order and the record of proceedings leading to that order were actually and physically before the Court as an exhibit.

In answer to the third question, if the prior proceedings are reviewed it is submitted that this Court will find a lack of due process, an absence of a fair hearing, and other infirmities.

ARGUMENT.

I. THE ADMINISTRATIVE PROCEEDINGS ARE SUBJECT TO COLLATERAL ATTACK.

Appellee's main argument (pages 10-18 of its brief) seems to be that the 1929 proceedings could not have been reviewed by the District Court and cannot be examined by this Court. At page 12 appellee cites

an annotation to *U.S. ex. rel. Knauff v. Shaughnessy,* 94 L.Ed. 317, 332. At page 334 of the annotation, the following language appears:

> "It is to be observed that, despite statutory provision that administrative decisions in deportations are to be final, such decisions may be collaterally reviewed by the courts by habeas corpus. United States ex. rel. Bilokumsky v. Tod (1923), 263 U.S. 149, 68 L.ed. 221, 44 S.Ct. 54; United States ex. rel. Vajtauer v. Commissioner of Immigration (1927), 273 U.S. 103, 71 L.ed. 560, 47 S. Ct. 302; Bridges v. Wixon (1945), 326 U.S. 135, 89 L.ed. 2103, 65 S.Ct. 1443 . . ."

It seems clear that where, as here, the government elects to base its present deportation order upon a prior deportation order, and where, as here, the alien is entitled to due process of law, that prior deportation order may be brought before the Courts to be tested for due process. If this were not so, the prior order would stand inviolate, no matter what its origin. If the government's argument is accepted it is conceivable that a person could be deported upon the fiat of any administrative tyrant without notice or hearing, and upon re-entry be re-deported under section 242f of the Immigration & Nationality Act of 1952 (8 U.S.C.A. sec. 1252f) with no power to disclose the basic defect of the prior order.

Such is not the law. If the alien is entitled to due process (and he is: *Galvan v. Press,* 347 U.S. 522, 530, 74 S. Ct. 737, 98 L.Ed. 911), he must have access to the Courts to enforce his right. (*Kessler v. Strecker,* 307 U.S. 22, 34, 59 S.Ct. 694, 83 L.Ed. 1082.) True,

the administrative order is final in the sense that it may not be reviewed judicially for error, a judicial trial *de novo* may not be had, nor is there a judicial appeal. The Courts, nevertheless, are available to preserve the constitutional right to due process of law. As the Supreme Court said in *Kessler v. Strecker, supra,* 307 U.S. 22, 34:

> ". . . The proceeding for deportation is administrative. If the hearing was fair, if there was evidence to support the finding of the Secretary, and if no error of law was committed, the ruling of the Department must stand and cannot be corrected in judicial proceedings. If on the other hand one of the elements mentioned is lacking, the proceeding is void and must be set aside . . ."

At page 15 of its brief the government charges that appellant "seeks to reopen the 1929 proceedings." Citing and discussing *U.S. ex rel. Blankenstein v. Shaughnessy,* 112 F. Supp. 607, (appellee's brief, pp. 13-14), the government points out that it was not bound to proceed under section 242f of the Act. The fact is, however, that the government did proceed under that section. By so doing, the government has brought before the Court the 1929 order—its present deportation order is, and must be, based upon the prior order. It cannot now prevent the Court from testing the prior order for due process.

Under subdivision (1), page 16 of its brief, the government argues that the terms of section 242f of the Act precludes review by this Court. We do not find any such proscription in the section; and if it

were there, it would be unconstitutional as contrary to the 5th amendment of the U.S. Constitution. (*Kessler v. Strecker,* 307 U.S. 22, 59 S.Ct. 694, 83 L.Ed. 1082; *Yamataya v. Fisher,* 189 U.S. 86, 23 S.Ct. 611, 47 L. Ed. 721.) In point are the very cases discussed and cited by appellee in its brief, pages 16-18.

In *U.S. ex. rel. Steffner v. Carmichael,* 183 F.2d 19, the alien was deported in 1933 in accordance with an interpretation of the law then existing. Later, in 1939, the Supreme Court handed down a contrary interpretation. The alien contended that he, therefore, had been illegally deported. The Court held that a change in the interpretation of law could not be accepted as the basis of reopening the case. But the Court did recognize its power to protect the alien's constitutional right to due process, as seen in the following excerpts from the case:

> ". . . we do not think it permissible to allow a collateral attack on the previous deportation order in a subsequent deportation proceeding, unless we are convinced that there was a gross miscarriage of justice in the former proceedings . . ." (p. 20.)
>
> . . . He had his day before the immigration authorities . . ." (pp. 20-21.)
>
> ". . . There is no showing that his failure to test the validity of this order was due to any cause other than his desire not to do so . . ." (p. 20.)

In the case here on appeal, there was a gross miscarriage of justice in the 1929 proceedings in spite of the *ipse dixit* to the contrary of appellee's counsel

at page 18 of its brief. The government took unseemly advantage of the imprisoned youth. Failing to cloak him decently with guardian or counsel, and failing to prove its case by witness or deposition, it exacted admissions of a crossing of the border by the appellant at age 16 under direction of his employer, and thereon based its deportation order.

Unlike the *Steffner* case, the appellant here has never truly "had his day before the immigration authorities." Further, the presence of counsel in the proceedings would probably have assured appellant of a test of the validity of the order at the time.

In *U.S. ex rel. Rubio v. Jordan,* 190 F.2d 573, cited at page 18 of the brief, the Court recognized that a gross miscarriage of justice is a basis for judicial review of the administrative proceedings. The Court concluded (pp. 575-576):

> "Here we find no such gross miscarriage of justice in the former deportation proceedings as would justify our review of those proceedings. At each step the petitioner was represented by counsel. . . ."

In *U.S. ex. rel. Beck v. Neely,* 202 F.2d 221, 223, also cited by appellee, the Court expressly recognized its power to examine the administrative proceedings for fairness in spite of a statute making the decision of the Attorney General final. The Court cited *U.S. ex. rel. Schlimmgen v. Jordan,* 164 F.2d 633, 634, where it was said:

> "Courts may not interfere with administrative determinations unless, upon the record, the pro-

ceedings are manifestly unfair, or substantial evidence to support the administrative finding is lacking, or error of law has been committed, or the evidence reflects manifest abuse of discretion . . ."

The *Beck* case also cited *Daskaloff v. Zurbrick,* 103 F.2d 579, 581, the last of appellee's cases in this section of its brief. In the *Daskaloff* case the Court examined the administrative proceedings to determine whether (1) there had been a fair hearing, (2) there was evidence upon which the order could have been predicated, and (3) there was no erroneous application of law.

In the case on appeal, the District Court erred in refusing to look at the record of the administrative proceedings in 1929. That record demonstrates its own fundamental defects.

II. EXAMINATION BY THE COURT OF THE PRIOR ADMINISTRATIVE PROCEEDINGS SHOULD INDEED CONSIST OF A REVIEW IN ACCORDANCE WITH THE ESTABLISHED PRINCIPLES.

At page 19 of its brief appellee indicates by its caption that it agrees with appellant. This section of its brief consists of three sub-headings entitled: (a) Due Process, (b) Fair Hearing, and (c) Evidence Must Support the Deportation Order. Authorities are cited under each sub-heading, and appellant cannot quarrel with the implications. The purpose of this appeal is to have a judicial review of the prior proceedings to

disclose the inherent defects therein consisting of lack of due process, absence of a fair hearing, and nonexistence of evidence to support the deportation order of 1929.

The balance of this section of the government's brief consists of two sentences and a list of cases. In the first sentence it is stated that the requirement of reasonable, substantial and probative evidence was added by the 1952 Act, sec. 242(b), 8 U.S.C. 1252(b). It may be that no prior statute has set forth the foregoing requirements, but the case law has long ago established that substantial evidence taken at the hearing is required. (*Whitfield v. Hanges,* 222 F. 745, 749.) Appellee infers that something less than or different from "reasonable", "substantial", or "probative" evidence would suffice prior to 1952, but no suggestion is tendered as to what standard should satisfy this Court. It is submitted that even in 1929 fairness demanded reasonable, substantial and probative evidence.

The second sentence of this section of appellee's brief purports to dispose of the case by asserting that appellant was afforded due process and a fair hearing, and that the evidence not only supported the findings but was reasonable, substantial and probative. We believe that we have adequately presented our case in the opening brief and hence will not reiterate our arguments. There remains only a duty to discuss the cases cited by the government.

The first case cited is *Del Guercio v. Delgadillo,* 159 F.2d 130. That case was reversed by the Supreme

Court *sub nomine Delgadillo v. Carmichael,* 332 U.S. 388, 68 S.Ct. 10, 92 L.Ed. 17. The case turned on the question of entry. The alien, a seaman, was shipwrecked and taken to a foreign port during wartime. He returned within a week. The Supreme Court held that there was no entry within the meaning of the Act. That there was a fair hearing in that case, and that there was an intelligent waiver of right to counsel in that case, do not militate against appellant in the instant case.

We have heretofore discussed *U.S. ex rel. Steffner v. Carmichael,* 183 F.2d 19, and *U.S. ex rel. Beck v. Neely,* 202 F.2d 221, next cited by appellee. In neither case were there any circumstances similar to those surrounding the 1929 proceedings concerning appellant herein.

The same can be said as to the final two cases cited by appellee. In *DeBernardo v. Rogers,* 254 F.2d 81, the alien entered this country in 1912. He committed one crime in 1927 and another in 1932, for both of which he was sentenced to more than one year. In 1932 he was ordered deported under the Immigration Act of 1917, sec. 19, in that he had been sentenced to imprisonment more than once for a term of more than one year for crimes involving moral turpitude. He was not deported, the government having decided to wait until his release from prison. In 1952, the deportation order was vacated, and administrative hearings were begun to determine whether one of the crimes for which he had been sentenced in fact involved moral turpitude. The alien was not represented by counsel

and was indigent and unable to engage counsel. The administrative hearings proceeded with the alien being unrepresented. He later brought suit for declaratory relief in which suit he was represented by counsel. He was found to be deportable. The Court of Appeal expressly refrained from deciding whether failure to provide counsel at the administrative level violated due process inasmuch as the alien was represented in the court proceedings, and in the administrative hearings the facts on which his deportation was ordered were not in issue.

The final case cited by appellee in this section of its brief (p. 20) is *Bisaillon v. Hogan* (9th Cir.), No. 15,749, decided by this Court in July of this year. In that case the alien contended that deportation proceedings were invalid because, among other reasons, she was not represented by counsel. This Court pointed out, however, that she was not indigent, that she was given opportunity to engage counsel but did not do so at the lower administrative level, that in fact she was represented by counsel before the Board of Immigration Appeals and before the Court. The case is not similar to the case on appeal except for the circumstance that the first hearing was held in prison.

Beyond the mere statement of the government that appellant was afforded due process and a fair hearing, and that there was substantial, reasonable and probative evidence to support the findings, there is nothing presented by the government to establish those elements.

In the opening brief we pointed out that the government did not *prove* an entry but that it rested on purported admissions exacted from the minor in prison without the protection of guardian or counsel. Ample authority was cited to demonstrate that such evidence is no evidence, and that such proceedings lacked the basic fairness required by the due process clause. The government has not attempted to refute the arguments, nor has it offered any authority to the contrary.

III. THE FINDING AS TO ENTRY WAS BASED UPON AN ERRONEOUS APPLICATION OF LAW.

As earlier argued, the government did not prove an entry by appellant. No evidence was offered except the debile "admissions" of appellant exacted in such circumstances as to demonstrate their incompetence. In addition, appellant has argued (opening brief, pp. 22-27) that, even assuming the facts to be as purportedly admitted, there was no entry within the meaning of the Act.

Congress has stated that there is no such entry if the departure from this country was not intended, was not reasonably to be expected, or was not voluntary. (8 U.S.C. sec. 1101 (a) (13).) In this connection, the quotation from *Carmichael v. Delaney,* 170 F.2d 239, 242, appearing at page 22 of appellee's brief, is directly in accordance with appellant's position: Not every physical entry constitutes an entry within the meaning of the law.

Contrary to the implication from the quotation from *Matsutaka v. Carr,* 47 F.2d 601, appearing on the same page of the government's brief, the *Carmichael* case was concerned with the fact of entry as well as with the right. In the first part of the case, the Court expressly held that in the circumstances of the case there was no entry. In the latter part of the case the Court discussed the right to enter and have a judicial trial.

Appellee also refers to *U.S. ex rel. Claussen v. Day,* 279 U.S. 398, 49 S.Ct. 354, 73 L.Ed. 758; *U.S. ex rel. Stapf v. Corsi,* 287 U.S. 129, 53 S.Ct. 40, 77 L.Ed. 215, and *U.S. ex rel. Volpe v. Smith,* 289 U.S. 422, 53 S.Ct. 665, 77 L.Ed. 1298. Those cases were considered by the Supreme Court in its decision in *Delgadillo v. Carmichael,* 332 U.S. 388, 68 S.Ct. 10, 92 L.Ed. 17. That was a case, like the present one, where the fact of entry had to be established in order to show conviction of a turpitude crime within five years. When the shipwrecked seaman returned to this country from the foreign port, the Supreme Court refused to characterize such arrival as an entry for such purpose. The Supreme Court cited *Di Pasquale v. Karnuth,* 158 F. 2d 878, and distinguished the three cases named as cases where the alien plainly expected or planned to enter the foreign country. The Court said that in the *Delgadillo* case the alien was forced to go, did not select the place, and that to treat his return as an "entry" within the law would be to give the law a "capricious application". Appellant here argues that his departure from the United States at the age of 16 under orders from his employer to deliver goods

across the border, if the government had proved such fact, was likewise a case where he was forced to leave, where he did not select the place, and where he did not voluntary depart. The case is similar to *Valenti v. Karnuth,* 1 F.Supp. 370, 373, where the schoolboy was taken to Canada on a picnic. The reasoning of the Court in that case is sound: The boy was not possessed of freedom to decide whether to go or not to go; "He is not a free agent acting entirely of his own volition."

Due process to one side, the arrival shown in the record has validity as an "entry" only if the law is misapplied. The government urges upon this Court a false premise: No matter what the circumstances of the departure, any arrival thereafter is an entry. In the words of the Supreme Court in the *Delgadillo* case (p. 391): "Respect for the law does not thrive on captious interpretations."

CONCLUSION.

Since the government has elected to attempt to deport appellant under 1929 proceedings, this Court has the power to test those proceedings for fairness, due process, and foundation in evidence.

The record shows that the government did not present any evidence of entry; the finding of entry was based solely upon purported admissions of the minor alien while in prison without guardian or counsel. Based upon said admissions, it was found that an

entry had been made. Said finding resulted from a misapplication of the law.

That the former proceedings were unfair and without due process and based upon incompetent evidence has not been refuted by the government other than by a simple denial.

Appelllant respectfully submits that justice and fairness require that the deportation order be nullified.

Dated, San Francisco, California,
October 3, 1958.

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